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cc: Leslie

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
Geokinetics Inc., *et al.*,[1]	)	Case No. 13-10472 (KJC)
Debtors.	)	Jointly Administered
	)	**Hearing Date: April 25, 2013 at 10:00 a.m.** **Objection Deadline: April 16, 2013 at 4:00 p.m.**

NOTICE OF MOTION OF WHITEBOX ADVISORS LLC, AS PRE-PETITION AGENT UNDER THE EXISTING CREDIT FACILITY TO ALLOW ITS CLAIM PURSUANT TO 11 U.S.C §§ 502 AND 506

PLEASE TAKE NOTICE that on April 2, 2013, Whitebox Advisors LLC (the "Agent"), in its capacity as Administrative Agent and Collateral Agent, by and through its counsel, Brown Rudnick LLP and Womble Carlyle Sandridge & Rice, LLP, filed the Motion of Whitebox Advisors LLC, as Pre-Petition Agent under the Existing Credit Facility to Allow its Claim Pursuant to 11 U.S.C. §§ 502 and 506 (the "Motion").

PLEASE TAKE FURTHER NOTICE that any response or objection to the Motion must be filed with the United States Bankruptcy Court for the District of Delaware, 824 North Market Street, 3rd Floor, Wilmington, Delaware 19801 on or before **APRIL 16, 2013, AT 4:00 P.M. PREVAILING EASTERN TIME** (the "Objection Deadline").

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal taxpaper-identification number, are: (Geokinetics Inc. (0082), Geokinetics Holdings USA, Inc. (6645), Geokinetics Services Corp. (1753), Geokinetics Processing, Inc. (9897), Geokinetics Acquisition Company (0110), Geokinetics USA, Inc. (7282), Geokinetics International Holdings, Inc. (8468), Geokinetics Management, Inc. (3414), Geokinetics International, Inc. (2143), and Advanced Seismic Technology, Inc. (9540). The Debtors' address is 1500 Citywest Boulevard, Suite 800, Houston, Texas 77042.

PLEASE TAKE FURTHER NOTICE that you also must serve a copy of the response upon counsel for the Agent so as to be received no later than the Objection Deadline:

Robert J. Stark
Brown Rudnick LLP
Seven Times Square
New York, NY 10036

Steven K. Kortanek
Womble Carlyle Sandridge & Rice, LLP
222 Delaware Avenue, Ste. 1501
Wilmington, DE 19801

Steven B. Levine
Andreas P. Andromalos
Brown Rudnick LLP
One Financial Center
Boston, MA 02111

PLEASE TAKE FURTHER NOTICE that the final hearing with respect to the Motion will be held before The Honorable Kevin J. Care at the United States Bankruptcy Court for the District of Delaware, 824 Market Street, 6th Floor, Courtroom No. 5, Wilmington, Delaware 19801 on **APRIL 25, 2013 AT 10:00 a.m. (prevailing Eastern Time).**

PLEASE TAKE FURTHER NOTICE THAT IF NO OBJECTIONS TO THE MOTION ARE TIMELY FILED, SERVED AND RECEIVED IN ACCORDANCE WITH THIS NOTICE, THE BANKRUPTCY COURT MAY GRANT THE FINAL RELIEF REQUESTED IN THE MOTION WITHOUT FURTHER NOTICE OR HEARING.

Dated: April 2, 2013

/s/ Steven K. Kortanek

WOMBLE CARLYLE SANDRIDGE & RICE, LLP
Steven K. Kortanek (Del. Bar No. 3106)
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
E-mail: skortanek@wcsr.com

and

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Seven Times Square
New York, NY 10036
Telephone: (212) 209-4800
Facsimile: (212) 209-4801

-and-

Steven B. Levine, Esq.
Andreas P. Andromalos, Esq.
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8200
Facsimile: (617) 856-8201

Counsel for Whitebox Advisors LLC, in its capacity as Administrative and Collateral Agent

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11 Case No. 13-10472 (KJC)
GEOKINETICS INC., et al.[1],	(Jointly Administered)
Debtors.	**Hearing: April 25, 2013 at 10:00 a.m.**
	Objection Deadline: April 16, 2013 at 4:00 p.m.

MOTION OF WHITEBOX ADVISORS LLC, AS PRE-PETITION AGENT UNDER THE EXISTING CREDIT FACILITY TO ALLOW ITS CLAIM PURSUANT TO 11 U.S.C §§ 502 AND 506

Whitebox Advisors LLC (the "Agent"), in its capacity as Administrative Agent and Collateral Agent, by and through its counsel, Brown Rudnick LLP and Womble Carlyle Sandridge & Rice, LLP, hereby moves (the "Motion to Allow") for the Court to allow its claim against Geokinetics Inc. and its affiliates (collectively, the "Debtors") in the amounts listed below as an oversecured claim pursuant to Sections 105, 502(b), and 506 of Title 11 of the United States Code, 11 U.S.C. § 101 et seq. (the "Bankruptcy Code"). In support of the Motion to Allow, the Agent respectfully represents as follows:

PRELIMINARY STATEMENT

In the Interim DIP Order[2] entered by this Court, the Debtors admitted that they were indebted to the Agent as of the Petition Date in the principal amount of $50,000,000, plus

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1 The Debtors in these Chapter 11 Cases and the last four digits of each Debtor's federal taxpayer identification number are as follows: Geokinetics Inc. (0082); Geokinetics Holdings USA, Inc. (6645); Geokinetics Services Corp. (1753); Geokinetics Processing, Inc. (9897); Geokinetics Acquisition Company (0110); Geokinetics USA, Inc. (7282); Geokinetics International Holdings, Inc. (8468); Geokinetics Management, Inc. (3414); Geokinetics International, Inc. (2143); and Advanced Seismic Technology, Inc. (9540).

2 See *Interim Order (I) Authorizing Debtors (A) To Obtain Post-Petition Financing Pursuant to 11 U.S.C. §§ 105, 361, 362, and 364, (B) To Use Cash Collateral Pursuant*

$1,216,145.83 in accrued and unpaid interest through such date, but exclusive of (i) interest accruing from the Petition Date to the date when such claim is paid, (ii) a $1.5 million (3%) Termination Premium, and (iii) reasonable attorneys' and other fees and expenses, all of which are due pursuant to the terms of the Credit Agreement (as defined below).[3] The Debtors have further stipulated that the obligations due under the Credit Agreement are secured by valid, binding, duly enforceable, and perfected first priority liens on all of the Pre-petition Collateral (as defined in the Interim DIP Order) and senior adequate protection liens on the assets of the Debtors' estate which were not encompassed within the Pre-petition Collateral.[4] There also can be no dispute that the Agent's claim is well oversecured, as evidenced by the total enterprise

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to 11 U.S.C. § 363, (II) Granting Certain Protections to Pre-Petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364, and (III) Scheduling Final Hearing Pursuant to Bankruptcy Rules 4001(b) and (c), dated March 12, 2013 [D.I. 71] (the "Interim DIP Order"). A fully consensual final order containing identical language was submitted to the Court on April 1, 2013. See *Notice of Filing of Proposed Form of Final Order (I) Authorizing Debtors (A) To Obtain Post-Petition Financing Pursuant to 11 U.S.C.§§ 105, 361, 362, and 364, (B) To Use Cash Collateral Pursuant to 11 U.S.C. § 363, and (II) Granting Certain Protections to Pre-Petition Secured Parties Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364*, dated April 1, 2013 [D.I. 156], Ex. 1 (the "Proposed Final DIP Order").

3 On the date hereof, the Agent is filing proofs of claim for such amounts against all Debtors as borrowers or Guarantors.

4 At the first day hearing in these cases, counsel to the Agent and counsel to the Debtors represented to the Court that they would work together on a briefing schedule that would result in the allowed amount of this claim being adjudicated more or less concurrently with confirmation. Although in the days immediately following that hearing, both counsel appeared to have reached such an agreement, the Debtors' counsel ultimately indicated that the Debtors and the two funds that were serving as Backstop DIP Lenders (as defined in the Interim DIP Order) and the Consenting Noteholders (as defined in the Interim DIP Order) under the Restructuring Support Agreement no longer wished to adhere to this schedule, but desired to postpone consideration of this issue (and any payment on even the undisputed components of the Agent's claims) until after the confirmation hearing. In order to afford the Court the opportunity to consider these issues in the context of confirmation, the Agent is filing the Motion to Allow consistent with the original schedule.

value of $280 million which the Debtors and plan proponents used for purposes of allocating value under the Plan.

Given these admissions, only three questions remain in regards to the allowance of the Agent's secured claim: (i) is the Agent entitled to the $1.5 million "Termination Premium" now due under the plain language of the Credit Agreement; (ii) is the Agent entitled to receive post-petition interest at the additional 2% default rate (together with interest on unpaid interest) as provided for under the plain language of the Credit Agreement; and (iii) what are the Agents' reasonable attorneys' fees? The answer to the first two questions is "yes."

First, Section 2.06 of the Credit Agreement governing the Debtors' prepetition secured debt gives the Debtors the option to terminate or permanently reduce the commitments thereunder prior to maturity, provided they pay a Termination Premium equal to 3% of the amount by which principal is so reduced. The Debtors' Plan provides that it will render the lenders under the Credit Agreement unimpaired by paying all amounts arising under the Credit Facility, including "any additional amounts [a]llowed by the Bankruptcy Court", see Plan at 3, with the proceeds of an exit loan and thereafter terminating such Facility. Because the Debtors have elected to permanently reduce the commitments outstanding under the Credit Agreement, the Termination Premium will become due on the Effective Date of the Plan, and should be allowed as part of the Agent's secured claim.

Second, the Credit Agreement specifies that following the occurrence of a bankruptcy filing or other Event of Default, interest accrues at a rate 2% higher than the normal 11.125% (or at 13.125%),and for so long as interest is not paid, interest on interest as expressly provided under Section 11.05 of the Credit Agreement. Under ample, applicable case law, default interest and interest on interest is payable on an oversecured claim.

Finally, there can be no dispute that as an oversecured creditor, the Agent is entitled to its reasonable attorneys' fees.

BACKGROUND

I. The Credit Agreement

1. On August 12, 2011, the Debtors entered into an amended and restated credit agreement (the "Credit Agreement") with the Agent (as administrative and collateral agent) and various lenders (the "Credit Agreement Lenders"). The Credit Agreement matures on September 1, 2014 (the "Maturity Date") and is governed by New York state law. A true and accurate copy of the Credit Agreement is attached hereto as Exhibit A.

2. On February 12, 2010, the Debtors entered into a pledge and security agreement (the "Pledge and Security Agreement"), pursuant to which the Debtors granted a security interest in substantially all of the Debtors' property to the Agent to secure the Debtors' obligations to the Agent under the Credit Agreement. On August 12, 2011, the Debtors entered into an acknowledgement and agreement of guarantors and grantors (the "Acknowledgement and Agreement of Guarantors and Grantors"), pursuant to which certain of the Debtors confirmed that they guaranteed all of the borrowings under the Credit Agreement.[5]

3. Under the Credit Agreement, the Credit Agreement Lenders agreed to make loans (the "Loans") to the Debtors in an aggregate principal amount of $50 million, at a Normal Rate (as defined in the Credit Agreement) of 11.125%. In the event of any Event of Default (as defined in the Credit Agreement), the interest rate on the Loans increases by 2.0 percentage points to 13.125% (the "Default Rate").

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[5] The Pledge and Security Agreement and the Acknowledgement and Agreement of Guarantors and Grantors are not attached to this Motion to Allow, but have been provided to the Debtors, and copies are available upon request.

4. The Credit Agreement provides that if the Debtors terminate or permanently reduce the unused portion of the commitments under the Credit Agreement (the "Credit Agreement Commitments"), a termination premium (the "Termination Premium") is due. See Credit Agreement § 2.06(a)(i).[6] In the Debtors' Disclosure Statement[7] and Restructuring Support Agreement,[8] the Debtors stated that on the Effective Date, "the Credit Facility . . . shall be deemed automatically cancelled, terminated and of no further force or effect" and that "the $50 million in outstanding revolving loans plus any accrued interest shall be satisfied in full with proceeds of the Exit Facility." See Disclosure Statement at 63; Restructuring Support Agreement, Ex. A (Summary of Principal Terms and Conditions of Restructuring) (the "Term Sheet") at 3.

5. The Termination Premium declines as the remaining life of the Credit Agreement declines, as set forth in the following table:

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6 In full, the provision reads:

> After the first anniversary of the Effective Date, the Borrower may, upon written notice to the Administrative Agent, terminate or permanently reduce the unused Aggregate Commitments on the fifteenth (15th) day of any calendar month; provided that (A) any such notice shall be received by the Administrative Agent not later than 12:00 noon (New York, New York time) on the seventh (7th) day prior to the date of such termination or reduction, (B) any such partial reduction shall be in an aggregate amount of $1,000,000 or any whole or multiple of $500,000 in excess thereof, and (C) on the date of such termination or reduction, the Borrower shall pay to the Administrative Agent, for the account of the Lenders in accordance with their respective Pro rata Shares, a fee equal to the following percentage of the amount by which the Aggregate Commitments have been reduced: [percentages follow].

7 See *Solicitation and Disclosure Statement for Joint Chapter 11 Plan of Geokinetics Inc., et al.* (the "Disclosure Statement"), dated March 10, 2013 [D.I. 10].

8 See Disclosure Statement, Ex. F (Restructuring Support Agreement) (the "Restructuring Support Agreement").

Date of Aggregate Commitment Reduction	Fees
After the first anniversary of the Effective Date but not before the second anniversary of the Effective Date	3%
After the second anniversary of the Effective Date but on or before the third anniversary of the Effective Date	1.5%
After the third anniversary of the Effective Date	0%

Accordingly, as of the Effective Date, the amount of the Termination Premium will be $1.5 million (or 3% of the full amount of the Credit Agreement Commitments and outstanding principle balance of the Loans).

6. The Credit Agreement provides that either (i) any failure to make a payment on other debt beyond the applicable grace period or (ii) the Debtors' filing for Chapter 11 relief constitute "Events of Default."

II. The Debtors' Chapter 11 Cases

7. On December 15, 2012, the Debtors failed to make a $14.6 million interest payment due to holders of its 9.75% senior secured note due 2014 (the "Notes"). At the close of the 30-day grace period related to that failure, on January 15, 2013, the Debtors entered into the Restructuring Support Agreement with holders of more than 70% in aggregate principal amount of the Notes and the largest holder of the Debtors' preferred stock. The Restructuring Support Agreement did not waive the payment default, but rather indicated that an Event of Default had occurred under the indenture governing the Notes (the "Indenture"), and provided that each Noteholder (as defined in the Indenture) would forbear from exercising their rights thereunder.

8. The Debtors' failure to make the interest payment due on the Notes before the expiration of the grace period triggered an Event of Default under the Credit Agreement. Though it was entitled to do so at the option of the Credit Agreement Lenders, the Agent took no action to accelerate the Loans or to terminate the Credit Agreement Commitments prior to the Petition Date.

9. The Restructuring Support Agreement contemplated a Chapter 11 bankruptcy filing to implement the Debtors' proposed plan of reorganization. Accordingly, on March 10, 2013 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. This filing triggered another Event of Default under the Credit Agreement.

10. Since the Petition Date, the Debtors have continued to operate and manage their businesses as debtors-in-possession. No statutory committee of unsecured creditors or equity holders has been appointed in these Chapter 11 cases (the "Chapter 11 Cases").[9]

11. On March 12, 2013, this Court issued an order (the "Interim DIP Order") approving, *inter alia*, interim debtor-in-possession financing, granting super-priority liens to the DIP Lenders and providing adequate protection to Existing Credit Agreement Parties (both as defined in the Interim DIP Order). The Pre-Petition Agent consented to the use of its Cash Collateral pursuant to the terms of such Order, on the condition that its claims would not be primed by the DIP Facility, but its claims would continue to be secured by first-priority liens on the Pre-petition Collateral and senior adequate protection liens on all assets of the Debtors not included within the Pre-petition Collateral (all as defined in the Interim DIP Order).[10]

12. In the Interim DIP Order, the Debtors stipulated and admitted that they are indebted to the Existing Credit Agreement Lenders (as defined in the Interim DIP Order) in the aggregate principal amount of $50,000,000, plus $1,216,145.83 in unpaid interest accrued through such date (but exclusive of interest accruing from and after such date, the Termination

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9 Because no such committee has been appointed, the period in which to bring any actions challenging the validity or perfection of the liens securing the obligations arising under the Credit Agreement will expire 15 days after entry of an order grating the relief grated in the Interim DIP Order on a final basis. See Interim DIP Order ¶ 18.

10 See Interim DIP Order ¶¶ D(v), 12.

Premium and the fees and charges due under the Credit Agreement, including the Agent's attorneys' fees and costs), and that such claims are not subject to cure, avoidance, reduction, set-off, offset, reclamation, subordination (whether equitable, contractual, or otherwise), counterclaims, cross-claims, recoupment, defenses, disallowance, impairment, or any other challenges under the Bankruptcy Code or any other applicable domestic or foreign law or regulation by any person or entity. The Debtors also stipulated to the validity, enforceability, and perfection of the Agent's first priority liens on substantially all of the Debtors' assets. See id. ¶ D(v). These admissions are to be made on a final basis in accordance with the Proposed Final DIP Order to be entered by this Court. See Proposed Final DIP Order ¶¶ D(v).

13. Notwithstanding these admissions, the Debtors, the Agent, and the Existing Credit Agreement Lenders respectively reserved their rights in respect only of the allowed amount of interest, fees, and other charges due under the Pre-Petition Loan Documents in excess of the $51,216,145.83 which the Debtors conceded was due as of the Petition Date in the Interim DIP Order (which amounts are to be determined by the Final Order (as defined in the Interim DIP Order) of this Court). See Interim DIP Order ¶ D(iii).

14. On the Petition Date, the Debtors filed their Chapter 11 plan (the "Plan") as Exhibit A to the Disclosure Statement. The Plan states the Agent's claim will be "unimpaired" and contemplates paying the full allowed amount of the Agents' claim, "including all interest that may have accrued on account of such Allowed Credit Facility Claim as determined by the Bankruptcy Court", from the proceeds of new exit financing on the Effective Date or as soon thereafter as may be reasonably practicabl. Plan at 16; see also Plan at 3 & n.2 (defining Credit Facility Claims as "the Allowed Claims arising under the Credit [Agreement], in an aggregate

principal amount of $50,000,000 . . . Plus any additional amounts Allowed by the Bankruptcy Court.").

JURISDICTION

15. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (B). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The statutory predicates for the relief requested herein are Sections 105(a), 502 and 506 of the Bankruptcy Code.

RELIEF REQUESTED

16. By this Motion to Allow, the Agent respectfully requests that this Court enter an Order allowing the Agent's proof of claim in the entire amount sought thereunder as a secured claim, including (i) a total of $51,216,145.83 in principal and prepetition interest which the Debtors admit was due as of the Petition Date, (ii) the $1.5 million Termination Premium, and any interest accrued thereon from and after the Effective Date (as defined under the Plan), (iii) interest accruing on each component of the Agent's secured claim, to the extent unpaid, from and after the Petition Date at the Default Rate, (iv) the Agent's attorneys' fees and other expenses, to the extent not paid currently, and (v) to the extent interest on the Loans is not paid currently, interest on such interest, on the grounds set forth below.

BASIS FOR RELIEF REQUESTED

I. The Agent Has a Secured Claim for Fees and Charges Due Under the Credit Agreement

17. An allowed claim is secured "to the extent of the value of such creditor's interest in the estate's interest in such property." 11 U.S.C. § 506(a). Bankruptcy Code Section 506(b) provides that, where secured creditors are oversecured (i.e., where the value of their collateral

exceeds the debts they are owed), their secured claim includes post-petition interest and any reasonable fees, costs and charges provided under the applicable agreements under which such claim arose. 11 U.S.C. § 506(b). The non-principal elements of the Agent's claim meet the requirements of Section 506(b), and its claim for the fees and charges due it, including the Termination Premium and interest at the Default Rate, should therefore be allowed.

A. The Agent's Claim is Oversecured

18. The Agent's first priority claim on substantially all of the Debtors' assets is oversecured by a substantial margin. Under the Plan, the entire amount of its allowed claim will be paid in full. See Disclosure Statement at 3-4 (describing the negotiations in connection with development of the Plan and the agreement to pay the Credit Facility Claims (as defined therein) in full, in cash). The valuation analysis attached to the Disclosure Statement indicates an enterprise value ranging from a low of $260 million to a high of $365 million. See Disclosure Statement, Ex. E (Valuation Analysis) at 3. For purposes of allocating value under the plan, a total enterprise value of $280 million was used. See Disclosure Statement at 71. Only Permitted Senior Liens as defined in the DIP Order) rank senior to the Agents' security interests – even the liens securing the DIP Facility are junior to the Agent's claim. See Interim DIP Order ¶ 6(a) (establishing priority of liens securing the DIP Facility). Thus, the Agent is an oversecured creditor under the meaning of Bankruptcy Code Section 506(b).

B. The Termination Premium is Due Under the Plain Language of the Credit Agreement

19. The threshold question as to whether a prepayment provision in an indenture will be enforceable in bankruptcy begins with whether the provision is enforceable under governing state law. New York State follows the "perfect tender in time" rule – a lender has the absolute right to rely upon the contracted-for interest stream over the life of a loan. See In re S. Side

House, LLC, 451 B.R. 248, 266-67 (Bankr. E.D.N.Y. 2011); In re Madison 92nd St. Assocs. LLC, 472 B.R. 189, 195 (Bankr. S.D.N.Y. 2012); Arthur v. Burkich, 131 A.D.2d 105, 106 (N.Y. App. Div. 1987) (under New York law, a borrower "has no right to pay off his obligation prior to its stated maturity date in the absence of a prepayment clause"). But lenders are free to contract for prepayment premiums, which are "viewed as the price of the option exercisable by the borrower to prepay the loan and cut off the lender's income stream." Madison, 472 B.R. at 195; see also S. Side House, 451 B.R. at 266-67 ("Prepayment provisions are the consequence of well-settled law, dating back to the early 19th century, that a borrower may not prepay its loan prior to the stated maturity date unless the parties otherwise agree or prepayment is allowed by statute.").

20. A lender's entitlement to a prepayment premium is dependent on the plain language of the governing documents. See SO/Bluestar, LLC v. Canarsie Hotel Corp., 825 N.Y.S.2d 80, 81 (N.Y. App. Div. 2006) ("[p]repayment clauses [should] be enforced according to their terms"); Signature Realty, Inc. v. Tallman, 2 N.Y.3d 810, 811 (2004) ("[W]hen parties set down their agreement in a clear, complete document, their writing should as a rule be enforced according to its terms.").

i. The Debtors Have Chosen to Terminate the Credit Agreement Commitments

21. Pursuant to Section 2.06(a) of the Credit Agreement, after August 12, 2012 (the first anniversary of the effective date of the Credit Agreement), the Debtors have the option to "terminate or permanently reduce" the unused Credit Agreement Commitments in whole or in part. Credit Agreement § 2.06(a)(i). If the Debtors choose to exercise this option before August 13, 2013, they must pay to the Agent a Termination Premium equal to 3% of the amount by which the Commitments have been reduced. See id.

22. Here, the Debtors have elected to permanently reduce the Credit Agreement Commitments by repaying them with the proceeds of an Exit Facility on the Effective Date, which the Plan provides they will enter into prior to the Effective Date. The Agent and the Credit Agreement Lenders would have been willing to reinstate their debt pursuant to Bankruptcy Code Section 1124, or otherwise to allow the debt to "ride through" the Chapter 11 Cases. The Debtors have instead chosen to terminate the Credit Agreement Commitments based on the belief that they can arrange cheaper exit financing.[11] In doing so, they have plainly exercised their "right or power to choose" to terminate the Commitments. Black's Law Dictionary 924 (8th ed. 2005) (defining "option"). This is on its face an "optional" termination or permanent reduction of the commitments. See Credit Agreement § 2.06(a) (providing for the Termination Premium upon "[o]ptional" termination or reduction of the Credit Agreement Commitments). Under the plain language of the Credit Agreement the Termination Premium is now due on account of the Debtors' choice to reduce the commitments thereunder.

23. In analyzing the analogous question of when a redemption under an optional redemption clause in an indenture is "voluntary", courts have considered (i) whether the lender has taken any actions to demand payment; see In re Pub. Serv. Co. of N.H., 114 B.R. 813, 819 (Bankr. D.N.H. 1990) (where lender had consistently negotiated and demanded cash payment of bonds, weighed against finding of voluntariness), and (ii) whether the debtor had control of the means of repayment, see id. (where exclusivity period had been terminated and debtor had no control over formulation of plan, payment pursuant to plan was not voluntary); see also Sharon

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[11] Cf. 7 Collier on Bankruptcy ¶ 1124.04[1] (16th ed. rev. 2013) ("The advantages of [reinstatement] to the debtor are easily illustrated. If the debtor has defaulted with respect to a long-term debt obligation that has an interest rate substantially lower than the current market rate, the plan can reinstate the original maturity of the obligation and the original, lower interest rate . . . .").

Steel Corp. v. Chase Manhattan Bank, N.A., 691 F.2d 1039, 1053 (2d Cir. 1982) (redemption premium "would apply in a voluntary liquidation which included plans for payment and satisfaction of the public debt"); In re A.J. Lane & Co., Inc., 113 B.R. 821, 826-27 (Bankr. D. Mass. 1990) (redemption in bankruptcy was voluntary where lender took no specific action to accelerate and where nothing compelled debtor to sell property and redeem with proceeds).

24. In this case, there can be no dispute that the Debtors have voluntarily chosen to terminate the commitments.

25. *First*, the Agent and the Credit Agreement Lenders have taken no action to force the Debtors to terminate the Credit Agreement Commitments. They did not accelerate the loans or declare an Event of Default, even in the face of the Debtors' failure to timely make the interest payment due on the Notes. See In re LHD Realty Corp., 726 F.2d 327, 332 (7th Cir. 1984) ("[I]f the lender wishes to preserve its right to a premium, it must forbear from exercising its acceleration option and await the trustee's or the debtor's decision. Should the trustee or the debtor then decide to repay the loan, the lender would presumably be able to enforce an otherwise valid prepayment premium."). They also consented to the use of their Cash Collateral. In fact, the Agent and the Credit Agreement Lenders would be willing to reinstate the Credit Agreement Commitments upon the Debtors' emergence from bankruptcy.

26. *Second*, the Debtors have complete control over the means of repayment. They publicly indicated their intention to pursue their chosen strategy (repayment via an exit facility rather than reinstatement) in the weeks and months leading up to the Petition Date, including in the Restructuring Support Agreement drafted almost two months before the Petition Date and the Plan and Disclosure Statement. See Term Sheet at 3 ("On the Effective Date, the $50 million in outstanding revolving loans plus any accrued interest [at the Normal Rate] shall be satisfied in

full with proceeds of the Exit Facility, or will be afforded such other treatment as agreed by the Revolving Lenders and the Majority Noteholders."); Plan at 5 ("'Exit Facility' means a senior secured credit facility . . . to be made available on the Effective Date to fund the cash requirements of the Plan, including, without limitation, repayment of the Credit Facility Claims"); Disclosure Statement at 64 ("on the Effective Date . . . the Credit Facility . . . shall be deemed automatically cancelled, terminated and of no further force or effect"). Presumably, the Debtors are making this choice to take advantage of the lower interest rates available due to their strengthened balance sheet upon emergence from Chapter 11.

27. As such, the Debtors' choice to terminate or otherwise permanently reduce the Credit Agreement Commitments is just that – a choice. This optional reduction in commitments clearly triggers a requirement to pay the Termination Premium.

ii. The Termination Premium is Due Notwithstanding Automatic Acceleration of the Loans

28. Section 9.02 of the Credit Agreement provides that the Debtors' filing for Chapter 11 relief constitutes an "Event of Default" that results in (1) automatic termination of the commitment of each Credit Agreement Lender to make loans under the Credit Agreement and (2) automatic acceleration of the unpaid principal and interest amount of the Loans. See Credit Agreement §§ 9.01(f), 9.02.[12]

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[12] Some courts have also held that the bankruptcy filing itself operates as an automatic acceleration of the debtors' debts. See, e.g., Calpine, 2010 WL 3835200, at *3 ("the filing of a bankruptcy petition renders all of a petitioner's outstanding debts mature and payable"); In re Granite Broad. Corp., 369 B.R. 120, 144 (Bankr. S.D.N.Y. 2007); In re Ridgewood Apartments of DeKalb County, Ltd., 174 B.R. 712, 720 (Bankr. S.D. Ohio 1994) ("Even without specific contractual language, a bankruptcy filing acts as an acceleration of all of a debtor's obligations."); In re Manville Forest Prods. Corp., 43 B.R 293, 297-98 (Bankr. S.D.N.Y. 1984) ("It is a basic tenet of the bankruptcy code that bankruptcy operates as the acceleration of the principal amount of all claims against the debtor. This tenet follows logically from the expansive Code definition of claim . . . and from the Code's provision in Section 502 that a claim will be allowed in bankruptcy

29. Reasoning that, as here, debtors retain an absolute right under Bankruptcy Code Section 1124(2) to reinstate accelerated debt,[13] several courts have held that a debtor's decision to prepay a debt automatically accelerated by its bankruptcy does not deprive the lender of its right to a termination premium. See, e.g., In re LHD Realty Corp., 726 F.2d at 332 ("[A]t least in a Chapter 11 proceeding, acceleration appears to be a conditional right of the lender subject to being undone by the cure provisions of sections 1123(a)(5)(G) and 1124. Section 1124(2) of the Bankruptcy Code expressly recognizes that a debtor pursuant to a Chapter 11 plan may reverse the acceleration of an obligation caused by his default."); In re 433 S. Beverly Drive, 117 B.R. 563, 569 (Bankr. C.D. Cal. 1990) (lender was entitled to the prepayment premium resulting from the debtor's voluntary prepayment even though lender had accelerated the debt, because notwithstanding the lender's acceleration, the subsequent bankruptcy filing had negated the lender's ability to insist upon a prepayment, and the debtor was entirely free to reinstate the debt); In re Skyler Ridge, 80 B.R. 500, 507 (Bankr. C.D. Cal. 1987) ("The automatic acceleration of a debt upon the filing of a bankruptcy case is not the kind of acceleration that

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regardless of its [11] contingent or unmatured status") (internal citations and quotation marks omitted), rev'd on other grounds, 60 B.R. 403 (S.D.N.Y. 1986). It has been suggested that automatic acceleration clauses in indentures are included in part to memorialize the rule explained in Manville. See Scott K. Charles & Emil A. Kleinhaus, Prepayment Clauses in Bankruptcy, 15 Am. Bankr. Inst. L. Rev. 537, 554 (2007).

[13] Section 1124 provides:

> Except as provided in section 1123 (a)(4) of this title, a class of claims or interests is impaired under a plan unless, with respect to each claim or interest of such class, the plan—
>
> > (2) notwithstanding any contractual provision or applicable law that entitles the holder of such claim or interest to demand or receive accelerated payment of such claim or interest after the occurrence of a default,
> >
> > . . .
> >
> > reinstates the maturity of such claim or interest as such maturity existed before such default . . . .

11 U.S.C. § 1124 (emphasis supplied).

eliminates the right to a prepayment premium .... This acceleration is subject to deceleration in a plan under Chapter 11 or Chapter 13 of the Bankruptcy Code."); Imperial Coronado Partners, Ltd. v. Home Fed. Sav. & Loan Ass'n (In re Imperial Coronado Partners, Ltd.), 96 B.R. 997, 1000 (9th Cir. B.A.P. 1990) (finding that a debtor's decision to prepay a note accelerated prior to the debtor's Chapter 11 filing was voluntary because the debtor was free to reinstate the debt under section 1124(2) of the Bankruptcy Code, and noting that "[w]ith respect to reinstatement, the question is not whether [the debtor] could, as a practical matter, afford to exercise its right, but whether it had the right to reinstate the loan. It did.").

30. Some courts have held that the automatic acceleration provided for in a contract actually advances the maturity date of a loan and precludes a finding of breach of a "no-call" provision (a clause prohibiting any prepayment prior to a specified date). See, e.g., Premier Entm't Biloxi LLC v. U.S. Bank Nat'l Ass'n (In re Premier Entm't Biloxi LLC), 445 B.R. 582, 630-31 (Bankr. S.D. Miss. 2010) (analyzing no-call provision and make-whole fee applicable only where debtor willfully defaulted to avoid a prepayment fee, and concluding that "a contractual acceleration provision, like the one at issue here, goes beyond allowing a creditor to file a claim for unmatured principal and actually advances the maturity date of the debt"); In re Solutia, Inc., 379 B.R. 473, 483-85 (Bankr. S.D.N.Y. 2007)(held that there was no prohibited "prepayment" and consequent violation of "no-call" clause because the indenture provided that that the notes were automatically accelerated as a result of the debtor's bankruptcy filing); HSBC Bank USA, N.A. v. Calpine Corp., No. 07 Civ 3088, 2010 WL 385200, at *3 (S.D.N.Y. Sept. 15, 2010) (held that "no-call" provisions were unenforceable because the debtor's bankruptcy filing constituted an event of default and accelerated the notes).

31. But these cases (none of which was decided in the Third Circuit and constitute binding precedent) concern no-calls, and not a clause that permits a reduction in the amount of a loan commitment subject to payment of a prepayment fee, as does the Credit Agreement clause that gives rise to the Termination Premium.

32. Perhaps somewhat more analogous to the Termination Premium at issue here are "optional redemption" clauses, which condition early redemption of notes on payment of a make-whole or prepayment fee. In a recent case from the Southern District of New York, Judge Gerber approved a settlement for 42% of an optional redemption premium based on a "make-whole" provision in the indenture governing a series of notes.[14] See Chemtura, 439 B.R. at 596. On the issue of acceleration and maturity date, Judge Gerber merely looked to the language of the indenture itself, which provided that a redemption premium was due if the company redeemed the notes "prior to the Maturity Date," and defined "Maturity Date" as "June 1, 2016." Id. at 601. Based on this language, Judge Gerber said that the bondholders arguing for the premium had "substantially the better argument." Id. at 601. Although he recognized that the company could argue that "Maturity Date" should be changed by operation of law when the notes are accelerated, Judge Gerber characterized that potential argument as "weak." Id.[15]

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[14] The settlement also provided that the notes would be paid "rather than reinstated," – language that acknowledges the debtors otherwise retained the right to do so. See In re Chemtura Corp., 439 B.R. 561, 569 (Bankr. S.D.N.Y. 2010); see also supra ¶ 29.

[15] As here, the "make-whole" provision in the relevant indenture was silent as to whether the premium was payable following acceleration due to bankruptcy. Recently, in U.S. Bank Trust National Association v. American Airlines, Inc. (In re AMR Corp.), 485 B.R. 279 (Bankr. S.D.N.Y. 2013), the bankruptcy court held that a make-whole premium was not due in conjunction with the debtors' refinancing of aircraft loans during their Chapter 11 case. But the indenture in American Airlines *expressly provided* that the optional redemption make-whole premium was not payable following the acceleration of the notes after an event of default, including automatic acceleration in bankruptcy. Id. at 301; see also id. at 303-04 ("The cases cited by [the indenture trustee] are not enlightening, as none contain contractual language specifically excluding the payment of a make whole

33. The decision in AE Hotel Venture v. GMAC Commercial Mortg. Corp., No. 05 C 2109, 2006 U.S. Dist. LEXIS 2040, at *10-11 (N.D. Ill. Jan. 20, 2006) is also instructive on the importance of the plain language of the agreement. There, the court noted that:

> The loan agreement is silent on whether an accelerated payment will vitiate a prepayment premium. Although the loan agreement is not explicit on the matter, to give meaning to this provision we will not exclude voluntary prepayments resulting from acceleration. If it was the intention of the parties to exclude accelerated payments, ***the parties should have provided for such under the agreement.*** For us to carve out an exception now would be to go against the agreement's framework. Consequently, the bankruptcy court was correct in finding that the loan agreement provided for prepayment penalties even in the event of acceleration.

Id. (emphasis added).

34. As in Chemtura and AE Hotel Venture, the language of the Credit Agreement governs this issue. The Debtors have chosen to terminate the commitments under the Credit Agreement. See Term Sheet at 3. They have "assessed [their] situation and decided that" repaying the Loans from exit facility proceeds is "a better business decision" than reinstatement. Imperial Coronado, 96 B.R. at 1000. By the plain language of the Credit Agreement, the Termination Premium is due.

C. The Termination Premium is a Reasonable Charge

35. Bankruptcy Code Section 506(b) allows for "reasonable fees, costs, or charges provided for under the agreement." 11 U.S.C § 506(b) (emphasis supplied). Courts agree that a prepayment premium is a "charge" as contemplated by Section 506(b). See A.J. Lane, 113 B.R.

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amount where there has been a bankruptcy default and resulting acceleration.") (emphasis added). Here, unlike in American Airlines, the Credit Agreement is silent as to whether the Termination Premium is intended to apply following the occurrence of an Event of Default.

at 825; Imperial Coronado, 96 B.R. at 1000 ("prepayment premium is clearly a 'charge provided for under the agreement'" under which such claim arose).

36. The determination of whether a pre-payment charge is reasonable has been considered a question of both state and federal law – some courts choose to treat the requirements as independent, while others collapse them. Compare Imperial Coronado, 96 B.R. at 1000-01 ("What constitutes a 'reasonable' charge under section 506(b) is a question of federal, not state law."); Chemtura, 439 B.R. at 603 ("The second layer of analysis would require consideration of any claims that were allowable under state law under the different . . . requirements of federal bankruptcy law."); In re Duralite Truck Body & Container Corp., 153 B.R. 708, 713 (Bankr. D. Md. 1993) ("Although [the creditor] likely has a recognizable claim for its prepayment premium under New York law, the claim must meet the federal reasonableness standard of 11 U.S.C. § 506(b) for it to be allowed in a bankruptcy case."), with Premier Entm't, 445 B.R. at 618 (stating that the holder of the make-whole claim had "the ultimate burden of proving . . . that the premium is valid under New York law, and that the premium constituted a "reasonable" charge under federal law."); Noonan v. Fremon Fin. (In re Lappin Elec. Co.), 245 B.R. 326, 329 (Bankr. E.D. Wis. 2000) ("This court is persuaded that it should apply a two prong approach in determining the reasonableness of a termination fee; that is, the provision in the loan agreement must be valid under state law, and it must also be a reasonable charge under § 506(b)."); Fin. Ctr. Assocs. of E. Meadow, L.P. v. TNE Funding Corp. (In re Fin. Ctr. Assocs. of E. Meadow, L.P.), 140 B.R. 829, 838 (Bankr. E.D.N.Y. 1992) ("In light of the above we need not decide whether the enforceability of a pre-payment charge is subject to a federal standard or a dual state-federal standard. We note, however, that we are inclined to favor the dual state-federal standard . . . .").

37. The Court need not decide today whether it favors the independent standard or the collapsed standard – the Termination Premium is enforceable under both state and federal law.

i. The Termination Premium is Valid and Enforceable Under State Law

38. Under New York state law, which governs the Credit Agreement, a prepayment premium or early termination fee (such as the Termination Premium) is analyzed as a liquidated damages provision. See In re Trico Marine Servs., Inc., 450 B.R. 474, 480 (Bankr. D. Del. 2011) (noting that under New York law, redemption premiums are "in the nature of liquidated damages rather than unmatured interest" and the "substantial majority" in favor of this position); JMD Holding Corp. v. Cong. Fin. Corp., 4 N.Y. 3d 373, 379-80 (2005) ("Whether the early termination fee represents an enforceable liquidation of damages or an unenforceable penalty is a question of law, giving due consideration to the nature of the contract and the circumstances").

39. In New York, a liquidated damages provision is valid and enforceable where "(1) actual damages may be difficult to determine; and (2) the sum stipulated is not 'plainly disproportionate' to the possible loss." United Merchs. & Mfrs., Inc. v. Equitable Life Assurance Soc'y of the U.S. (In re United Merchs. & Mfrs., Inc.), 674 F.2d 134, 142 (2d Cir 1982). If a party decides to oppose the enforceability of a prepayment provision, that party bears the burden of proving the provision constitutes an unenforceable penalty and not a liquidated damages provision. See JMD Holding Corp, 4 N.Y.3d at 379-80.

40. The reasonableness of the damages is determined as of the time the parties entered the agreement and not at the time damages become payable. See Walter E. Heller & Co. v. Am. Flyers Airline Corp., 459 F.2d 896, 898 (2d Cir. 1972) ("The soundness of such a clause is tested in light of the circumstances existing as of the time that the agreement is entered into rather than at the time that the damages are incurred or become payable"); Seidlitz v. Auerbach, 230 N.Y. 167, 172 (1920) ("determining whether the amount . . . is to be treated as

liquidated damages or as a penalty the agreement is to be interpreted as of its date, not as of its breach") (citations omitted).

41. *First*, many courts applying New York State law have upheld the use of a reasonable make whole formula under a liquidated damages analysis. See, e.g., United Merchs., 674 F.2d at 143 ("it is apparent that the potential damages from breach of the loan agreement in this case were difficult to determine"); see also S. Side House, 451 B.R. at 270 ("Actual damages are difficult to determine even where the loan payments are calculated based on a set formula"); Fin. Ctr. Assocs., 140 B.R. at 837 ("Slight differences in formulating similar formulas will, over long periods of time and when applied to large sums of money, result in pre-payment charges of great disparity"). Fixed sum charges are enforceable as liquidated damages provisions. See JMD Holding, 4 N.Y.3d at 380 (approving a 1.5% early termination fee in a commercial revolving loan agreement); Conn. Gen. Life Ins. Co. v. Schaumburg Hotel Owner Ltd. P'ship (In re Schaumburg Hotel Owner Ltd. P'ship), 97 B.R. 943, 954 (Bankr. N.D. Ill. 1989) (approving a prepayment fee set at 10% of the outstanding principal amount of a loan).

42. This is particularly true in respect of a prepayment premium calculated as a fixed sum charge equal to low single digit percentage of principal, like the modest Termination Premium at issue here (a fixed 3% of the terminated commitments). See JMD Holding, 4 N.Y.3d at 380 (approving a 1.5% early termination fee). Such a premium is not "plainly disproportionate" to the Credit Agreement Lenders' potential loss of an 11.125% interest stream on a $50 million loan until September 2014.[16] The reasonableness of the modest 3% – $1.5 million – fee at issue here is in stark contrast to the size of the fees at issue in other cases

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16 If the Loans were fully drawn (as they have been historically), the Agent and the Lenders would be entitled to over $10 million in interest payments between the date hereof and the Loans' maturity.

involving the application of a formula based on applicable Treasury Rates plus a small increment. See, e.g., In re Vanderveer Estates Holdings, Inc., 283 B.R. 122, 126, 131 (Bankr. E.D.N.Y. 2002) (approving premium of approximately 11%); Anchor Resolution Corp. v. State St. Bank & Trust Co. of Conn. (In re Anchor Resolution Corp.), 221 B.R. 330, 341 (Bankr. D. Del. 1998) (approving adjusted make-whole premium of 6.9%); Fin. Ctr. Assocs., 140 B.R. at 837-38 (finding prepayment premium equal to 20.9% of face loan amount to be "high" but not "unreasonable"); see also In re Kroh Bros. Dev. Co., 88 B.R. 997, 1002 (Bankr. W.D. Mo. 1988) ("at most a 10% prepayment charge could be considered within the realm of reasonable. A 25% charge . . . is clearly unreasonable").

43. Moreover, while not sufficient by itself to render a penalty clause enforceable, courts generally give some deference to the principle that sophisticated parties ably represented by counsel should have the freedom of contract to select a make-whole formula, and the court should refrain from substituting its judgment for theirs unless the formula selected does not satisfy the liquidated damages test. See, e.g., Chemtura, 439 B.R. at 602 ("[I]f . . . the sophisticated parties who agreed to these provisions were trying to approximate the lenders' loss in the event of early repayment, I think I and many other courts would be reluctant to invalidate the Make-Whole Provision (or, especially, to invalidate it in full), unless it turned out to be truly an unjustifiable penalty."); Fin. Ctr. Assocs., 140 B.R. at 837-38 (court upheld a clause negotiated in "an arms-length transaction between adequately represented sophisticated businessmen"); In re C.P. Holdings, Inc. 332 B.R. 380, 391 (Bankr. W.D. Mo. 2005).

ii. The Termination Premium is Reasonable Under Bankruptcy Code Section 506(b)

44. Some courts have performed an independent analysis of whether a charge is "reasonable" under Bankruptcy Code Section 506(b). See, e.g., Imperial Coronado, 96 B.R. at

1000-01 ("What constitutes a 'reasonable' charge under section 506(b) is a question of federal, not state law."); Duralite, 153 B.R. at 713 ("Although [the creditor] likely has a recognizable claim for its prepayment premium under New York law, the claim must meet the federal reasonableness standard of 11 U.S.C. § 506(b) for it to be allowed in a bankruptcy case."). A premium is reasonable under Bankruptcy Code Section 506(b) if it attempts to compensate a lender for the actual damages incurred upon repayment, id. at 132, and where (i) they are bargained for and agreed upon by the parties, (ii) they represent a reasonable estimate of damages at the time of contracting, (iii) they decline over time as the risk of repayment decreases or are otherwise tied to an applicable interest rate, and (iv) they do not effect an unlawful windfall to the oversecured creditor to the detriment of other creditors in the debtor's bankruptcy case. See United Merchs., 674 F.2d 134; Vanderveer, 283 B.R. at 838; Fin. Ctr. Assocs., 140 B.R. 829.

45. Here, the Debtors' choice to terminate the Loans instead of reinstating them in the Chapter 11 Cases has damaged the Credit Agreement Lenders by depriving them of the right to collect a stream of 11.125% interest income for the remaining term through September 1, 2014. The Prepayment Premium declines over time precisely to reflect the reduced difference in injury to holders as the remaining life of the Credit Agreement declines. Thus, as the risk of the Credit Agreement Lenders' investment declines over time, the Credit Agreement Lenders stand to recover less of a premium in the event of redemption. This is exactly the type of prepayment premium that alleviates the damages to Credit Agreement Lenders by early termination.

46. Bankruptcy courts have also taken into account the absolute amounts of make-whole premiums as a percentage of total outstanding debt and approved fees much higher than 3%. See Anchor Resolution, 221 B.R. at 341 ("the amount of the make-whole claim as a

percentage of the principal is reasonable"); supra at ¶ 42 (collecting cases). The 3% Termination Premium cannot be deemed "unreasonable" under this standard. See Kroh Bros., 88 B.R. at 1002 ("under § 506(b) at most a 10% prepayment charge could be considered within the realm of reasonable. A 25% charge . . . is clearly unreasonable").

47. Because both the state and federal standards for allowing a termination premium have been satisfied, the Termination Premium qualifies as a "reasonable" charge under Bankruptcy Code Section 506(b) and an enforceable claim for liquidated damages at State law.

II. Interest on the Agent's Secured Claim

48. The Debtors' Plan provides for post-petition interest on the Loans as determined by the Court. See Term Sheet at 3. In this Circuit and elsewhere, that entitles the Agent to interest accruing at the applicable rate under the Credit Agreement which, in this case, is 13.25% compounded interest (including the 2% default rate plus interest on interest).

A. Pre-Petition Interest is Allowable

49. "Prepetition interest is generally allowable to the extent and at the rate permitted under the applicable nonbankruptcy law, including the law of contracts." Key Bank Nat'l Assoc. v. Milham) In re Milham, 141 F.3d 420, 423 (2d Cir. 1998); see also In re 785 Partners LLC, 470 B.R. 126, 131-32 (Bankr. S.D.N.Y. 2012) (citing a string of cases for the proposition that however high, default rates are generally products of agreements between sophisticated parties and not subject to rewriting based on equitable consideration, and enforcing a 5% default premium).

50. Here, the Credit Agreement provides that absent an Event of Default, interest will accrue at the Normal Rate. Thus, through January 15, 2014, when the grace period expired after the Debtors' failure to make the required December interest payment on the Notes (thus

triggering an Event of Default), interest accrued on the Loans at the Normal Rate of 11.125% – thereafter, it accrued at the Default Rate.

B. Post-Default Interest Should be Allowed at the Default Rate

51. It is axiomatic that an oversecured creditor is entitled to post-petition interest on its claim through the date of payment thereof. See 11 U.S.C. § 506(b); United States v. Ron Pair Enters., Inc., 489 U.S. 235, 248 (1989) (an oversecured creditor is entitled to pendency interest under Section 506(b)). "[T]he great majority of courts to have considered the issue since Ron Pair have concluded that postpetition interest should be computed at the rate provided in the agreement, or other applicable law, under which the claim arose." 4 Collier on Bankruptcy ¶ 506.04[2][b][i] (16th ed. rev. 2013) (collecting cases and noting that "there is no basis upon which to infer from the language or purpose of section 506(b) that Congress intended section 506(b) to authorize special bankruptcy rates of interest").

52. Still, some courts have recognized a rebuttable presumption that the oversecured creditor is entitled to default interest at the contract rate subject to adjustment based on equitable considerations.[17] See, e.g., 785 Partners, 470 B.R. at 134; In re Johnson, 184 B.R. 570, 573 (Bankr. D. Minn 1995) ("bankruptcy courts recognize a presumption in favor of the parties['] agreed interest rate subject to rebuttal based upon equitable considerations"); In re Ace-Texas, Inc., 217 B.R. 719, 723 (Bankr. D. Del. 1998) ("To determine the proper interest rate, courts employ a presumption in favor of the contractual [default] rate of interest subject to rebuttal based upon the equitable considerations specific to each case."). But "[t]he power to modify the contract rate based on notions of equity should be exercised sparingly." 785 Partners, 470 B.R.

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[17] To support this position, these courts point to the fact that Section 506(b) does not specify at what rate interest accrues. See, e.g., 785 Partners, 470 B.R. at 134 ("Section 506(b) does not state that the oversecured creditor is entitled to collect post-petition, or pendency, interest at the contract rate.").

at 134. And the debtor bears the burden of rebutting the presumption. See In re Route One W. Windsor Ltd. P'ship., 225 B.R. 76, 87 (Bankr. D.N.J. 1998) ("The effect of the rebuttable presumption in favor of the contract rate is to impose upon the debtor the burden of proving that the equities favor allowing interest at a different rate.").

53. Courts routinely find default interest provisions reasonable where they are identical to or even higher than the 2% default premium here. See, e.g., Southland Corp. v. Toronto-Dominion (In re Southland Corp.), 160 F.3d 1054, 1060 (5th Cir. 1998) (finding 2% differential reasonable); In re Terry Ltd. P'ship, 27 F.3d 241, 244 (7th Cir. 1994) (finding 3% differential reasonable); In re Payless Cashways, Inc., 287 B.R. 482, 489-90 (Bankr. W.D. Mo. 2002) (finding 1% differential reasonable); Vanderveer, 283 B.R. at 134 (finding 5% differential reasonable); Route One W. Windsor Ltd. P'ship, 225 B.R. at 90 (finding 8% differential reasonable); In re Liberty Warehouse Assocs. Ltd. P'ship, 220 B.R. 546, 551 (Bankr. S.D.N.Y. 1998) (finding 8.8% differential reasonable); Ace-Tex., Inc., 217 B.R. at 723-24 (finding 2% differential reasonable);

54. Furthermore, Delaware courts routinely grant to secured creditors, as part of adequate protection packages, interest on their claim at the default rate. See, e.g., *Final Order Pursuant to 11 U.S.C. §§ 105, 361, 362, 363, 364 and 507 (1) Approving Senior Secured Superpriority Postpetition Financing, (2) Authorizing Use of Cash Collateral, (3) Granting Liens and Providing Superpriority Administrative Expense Status, (4) Granting Adequate Protection, and (5) Modifying Automatic Stay*, In re Gottschalks Inc., Case No. 09-10157 (KJC) 2009 Bankr. LEXIS 4874, at *42 (Bankr. D. Del. Feb. 13, 2009); *Final Order Pursuant to Sections 31, 362, 363 and 364 of the Bankruptcy Code and Rule 4001 of the Federal Rules of Bankruptcy Procedure Authorizing the Debtors to (I) Use Cash Collateral of the Prepetition Secured Parties,*

(II) Obtain Post-Petition Financing, and (III) Provide Adequate Protection to the Prepetition Secured Party, In re Accuride Corp., Case No. 09-13449 (BLS), 2009 WL 7226972 (Bank. D. Del., Nov. 2, 2009).

55. While the Events of Default triggered by (i) the Debtors' failure to make the required interest payment on the Notes and (ii) the Debtors' seeking Chapter 11 relief are continuing, interest on the Loans is accruing and should be allowed at the Default Rate of 13.125%.

C. Interest on Interest is Allowable

56. The Credit Agreement also provides that during the continuance of an Event of Default, accrued and unpaid interest "including interest on past due interest" is payable on demand. Credit Agreement § 2.08(c). As described above, two Events of Default are currently continuing, resulting from (i) the missed interest payment on the Notes and (ii) the Debtors' chapter 11 petitions. The Debtors have not disputed the occurrence and continuance of these Events of Default.

57. Bankruptcy courts will enforce "interest on interest" or "compound interest" clauses to the extent they are enforceable under state law. See Manville Forest Prods. Corp., 43 B.R. at 300 ("The bankruptcy rule regarding interest on interest, or compounded interest, is that 'where there is a *contractual* provision, valid under state law, providing for interest on unpaid installments of interest, the bankruptcy court will enforce the contractual provision with respect to both installments due before and installments due after the petition was filed'") (emphasis in original). New York state law, which governs the Credit Agreement, provides for compound interest. See N.Y. Gen. Oblig. Law § 5-527(1) (McKinney 2013) ("[a] loan or other agreement providing for compound interest shall be enforceable"); see also NML Capital v. Republic of Argentina, 17 N.Y.3d 250, 266 (2011), aff'd, 435 Fed. Appx. 41, 43 (2d Cir. 2011) (holding that

bondholders were entitled to prejudgment interest on unpaid biannual interest payments that were due – but were not paid – after loans were either accelerated or matured on the due date).

D. Attorneys' Fees are Allowable

58. The Credit Agreement also provides that after the occurrence of an Event of Default, the Debtors must indemnify the Agent against its counsel's reasonable fees and expenses. See Credit Agreement § 11.04. To the extent these fees are not paid currently as provided for in the Interim DIP Order,[18] these fees and any interest thereon should be included in the Agents' secured claim.

NOTICE

59. Notice of this Motion to Allow has been provided to (i) the Office of the United States Trustee for Region 3; (ii) Akin Gump Strauss Hauer & Feld LLP, as proposed counsel to the Debtors and Debtors-in-Possession; (iii) Richards, Layton & Finger, P.A., as proposed Delaware counsel to the Debtors and Debtors-in-Possession; (iii) Fried, Frank, Harris, Shriver & Jacobson LLP, as counsel to the Consenting Noteholders and the Backstop DIP Lenders; (iv) Pachulski, Stang, Ziehl & Jones LLP, as Delaware counsel to the Consenting Noteholders and the Backstop DIP Lenders; and (v) all parties that have filed a notice of appearance and requested service in these Chapter 11 Cases pursuant to Bankruptcy Rule 2002. The Agent submits that no other or further notice need be provided

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[18] The Interim DIP Order provides that the Agent's counsel's fees must be paid currently. See Interim DIP Order ¶ 12(c) (counsel to the Agent is to receive "current cash payments of the reasonable expenses of the attorneys for the Pre-petition Agent and the Existing Credit Agreement Lenders under the Existing Credit Agreement (including, but not limited to, the fees and disbursements of Brown Rudnick, LLP and Womble Carlyle Sandrdige & Rice, LLP as co-counsel to the Pre-petition Agent and Existing Credit Agreement Lenders) promptly upon receipt of invoices therefor").

NO PRIOR REQUEST

60. No prior request for the relief sought herein has been made to this Court or any other Court.

CONCLUSION

WHEREFORE, the Agent respectfully requests that this Court enter an Order (i) allowing the Termination Premium, and any interest accrued thereon, in its entirety, as part of the Agent's secured claim, (ii) allowing interest on the Agent's secured claim at the Default Rate, and (iii) granting such other and further relief as it deems appropriate.

[Signature page follows]

Dated: Wilmington, Delaware
April 2, 2013

Respectfully submitted,

/s/ Steven K. Kortanek

WOMBLE CARLYLE SANDRIDGE & RICE, LLP
Steven K. Kortanek (Del. Bar No. 3106)
222 Delaware Avenue, Suite 1501
Wilmington, DE 19801
Telephone: (302) 252-4320
Facsimile: (302) 252-4330
E-mail: skortanek@wcsr.com

and

BROWN RUDNICK LLP
Robert J. Stark, Esq.
Seven Times Square
New York, NY 10036
Telephone: (212) 209-4800
Facsimile: (212) 209-4801

-and-

Steven B. Levine, Esq.
Andreas P. Andromalos, Esq.
One Financial Center
Boston, MA 02111
Telephone: (617) 856-8200
Facsimile: (617) 856-8201

Counsel for Whitebox Advisors LLC, in its capacity as Administrative and Collateral Agent